No. 704.

IN THE

SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 704.

CRAIG SIEGFRIED, As a Sole Proprietor and As a Partner in The Blue Valley Company, a Partnership Composed of Craig Siegfried, Cedric Siegfried, Charles M. Siegfried and Frank E. Fowler,

Petitioner,

vs.

THE KANSAS CITY STAR COMPANY, a Corporation, and EMIL A. SEES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is not yet officially reported but is printed as Appendix A to the Petition at pages A1-A16.

The opinion of the District Court is reported at 193 F. Supp. 427.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals was entered January 9, 1962, no petition for rehearing was filed, and the Petition for a writ of certiorari was filed February 5, 1962.

QUESTION PRESENTED.

The only question presented by the Petition is whether the court below properly held that petitioner had been accorded his right to a trial by jury where the trial court fairly submitted the case to the jury, the jury returned special verdicts finding that petitioner had wholly failed to sustain his burden of proving the amount of his damages without resort to speculation and conjecture and that the amount of his damages was accordingly "speculative" and the trial court entered judgment for petitioner for nominal damages.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The statutes involved are Section 2 of the Sherman Act and Section 4 of the Clayton Act, cited in full and quoted in the Appendix hereto, and in addition, Amendment VII to the Constitution of the United States and Rule 38(a) of the Federal Rules of Civil Procedure (cited and quoted in the Petition, p. 2).

STATEMENT.

Petitioner instituted a private civil action for damages claimed to have resulted from respondents' alleged violations of Section 2 of the Sherman Act (15 U.S.C.A., Sec. 2). Petitioner published a daily newspaper and a weekly throw-away shopper publication in Independence, Missouri, and owned and operated a daytime-only radio station in the same city. Respondents, during the period involved, published a daily newspaper in Kansas City, Missouri, and owned and operated a radio and television broadcasting station in that city. Petitioner contended that respondents injured him in his business and property and instituted suit pursuant to Section 4 of the Clayton Act (15 U.S.C.A., Sec. 15).

Since petitioner's only present ground of alleged error relates to the form of the submission of the case to the jury, we shall limit our statement to the sequence of events occurring after the close of the trial. The case was submitted to the jury with full and comprehensive instructions covering all issues (R. 293-334), including 8 pages dealing solely with damages (R. 323-331). In the course of this charge the trial court specifically instructed the jury that if the amount of damages was speculative petitioner was entitled only to nominal damages, stating (R. 330):

> "If the fact of damage is shown to exist by a preponderance of the evidence and the amount of damage is left in conjecture, speculation or surmise, then plain-

*Since petitioner has not complied with Rule 21-2 of the Rules of this Court in notifying respondents of the contents of the record filed in this Court, respondents must assume that petitioner has filed the same record herein as was filed in the court below and all references are to that record.

tiffs can only recover nominal damages, i. e. $1.00, or some other modest sum."

At the close of the charge the case was submitted to the jury with forms calling for general verdicts (R. 332-3). Thereafter, and on the same day when the jury had deliberated some two hours, the court inquired of the foreman as to whether a verdict had been reached and, receiving a negative answer, recessed the jury until the following morning (R. 336).

The following morning and prior to the jury's resumption of deliberations the court called counsel into chambers and submitted to them copies of forms of special verdicts which it proposed to submit to the jury in lieu of the general verdict forms. Counsel were afforded full and adequate opportunity to examine the special verdict forms, to request additional interrogatories, and to except thereto if desired (R. 337). Counsel for petitioner excepted to the submission of the special verdicts and the court's alleged failure to include a special verdict relating to the claimed increased cost of circulation occasioned by respondents' failure to permit their contract carriers to distribute petitioner's publications (R. 337-8) and in accordance with petitioner's exception the court amended the special verdict forms submitted to the jury (R. 343).

The court thereupon returned to the courtroom and again inquired of the jury foreman whether any verdict had been reached in the case or any agreement had been reached on any issues, as follows (R. 338):

> "The Court: Mr. McCall, last evening you stated to me that you had not reached any verdict in the case, and I understand from that that you do not have a unanimous opinion with reference to any of the issues that you were considering. Is that correct?
>
> Foreman McCall: That is correct."

The court then withdrew the general verdict forms and submitted the special verdict forms to the jury and the jury resumed deliberations (R. 338-44).

Later in the day the jury sent the following note to the court (R. 356):

> "We are in agreement as to all questions except those questions pertaining to the amount of damages. Are there any instructions which you may properly give us to enable us to arrive at a basis to be used in determining the amount of damages? Charles F. McCall."

The court thereupon called the jury back to the courtroom and repeated its instructions with respect to damages which had been previously given (R. 348-54). The court then gave the following additional instructions to the jury (R. 354-56):

> "The evidence in the case does leave a void and I know that you have and will have a difficulty with this question of the amount of damages. But the burden of proof is upon the plaintiffs to sustain the amount of damages with some reasonable degree of certainty in the case. The law casts that burden of proof upon the plaintiffs. If the plaintiffs have not sustained the burden of proof, then they are not entitled to recover more than one dollar, or some nominal sum, as damages with reference to any particular item of their business that was been damaged, if you find that it was damaged, by reason of the monopoly or the attempt to monopolize here charged.
>
> The case has been presented to you by exhibits and other matters that do not demonstrate, in my opinion—*but you are not bound by my opinion*—In my opinion, however, the case does not demonstrate the amount with a reasonable degree of certainty that the plaintiff in this case has been damaged. *That is*

my opinion. I am expressing it to you but you are not bound by it.

Follow the instructions as I have given them to you and keep those matters in mind. But the proof in the case has not established net losses from the operation of these businesses as the plaintiffs claim. There may be shown the question of the impact of damage upon those businesses of some kind, to some extent. But the evidence does not demonstrate the amount of loss. It leaves it, in my opinion, speculative and conjectural. *Now, I say this to you, and that is my opinion, but you use your own opinions and you are not to be influenced by anything that I say to you in this charge in that respect. You use your own opinions, consider the evidence.* But really there is no evidence in this record from which I, as a judge, can ascertain that amount of damages that would reasonably be recovered by the plaintiffs in this case with any reasonable degree of certainty. That is the state of the record. The record was made by the plaintiffs in that fashion.

* * *

Now, in view of the form of the verdict that I have given to you, if you find that the plaintiffs were injured in any one of their business operations by reason of the monopoly, but you cannot ascertain the amount of it, you may either put down the sum of one dollar or you may write in the word 'speculative.' *But if you write in the sum of one dollar, or any other noblest sum, all of you agree upon that particular amount. If you write in the word 'speculative' all of you agree among yourselves whether that is the state in which you are left by reason of the proof in the case.*

If you do that, then there are questions of law which that will indicate to the Court to pursue under the law. That would be an aid to the Court in this case. If you are left in that state of mind and you can't ascertain the amount of damages and you think

that it is speculative, either write the sum of one dollar or put the word 'speculative' so that the Court will have an indication of what your collective mind is with reference to that particular subject." (Emphasis ours.)

Thus, while the court in the supplemental charge expressed its opinion as to the state of the evidence on damages, on three occasions therein it also informed the jurors that they were not bound by the court's opinion. They were further informed that if they wrote in the word "speculative" as to the amount of petitioner's damages in the special verdict forms, all must agree upon that verdict.

Thereafter, the jury returned to the courtroom and reported that it had reached a verdict. The jury found that petitioner suffered no loss of circulation revenues and that any damages suffered by petitioner with respect to advertising revenues were "speculative." (R. 29-32.)

After reading and receiving the verdicts, the court stated (R. 358):

> "The Court: I think it is a very fine verdict for you to return and *it will be a verdict from which the Court can make applications of law.* It gives to me a pattern from which to finally determine this case. Of course there will be other matters that will be submitted to the Court, notwithstanding your verdicts here, but it will give me a pattern, and your thoughts are very, very helpful.
>
> "I will say to you that I have worked with this case for two years and had at least 10 pretrial conferences in the case, and it has been a difficult matter. But your verdict cuts out a lot of cobwebs in the case and now gives me a clean pattern to work on, and I am very thankful to each one of you for it." (Emphasis ours.)

Thereafter, the court requested counsel to file motions as to the form of judgment to be entered on the verdicts (R. 33). Petitioner responded by requesting the court to grant a trial *de novo* on all issues, or, in the alternative, to grant a new trial on the issue of damages alone on the ground that the jury's answers to the special verdicts dealing with the amount of damages were no answers at all (R. 34-39). Respondents moved for the entry of judgment in favor of petitioner for nominal damages on the ground that petitioner did not sustain his burden of proving the amount of his damages without resorting to speculation and conjecture (R. 40-46). The court entered judgment for petitioner for one dollar on each of four counts, which was trebled (R. 71-75). The District Court, in addition, wrote an opinion setting forth his views of the evidence and the law (193 F. Supp. 427; R. 47-71).

Petitioner appealed to the Court of Appeals, which affirmed the judgment of the District Court. With respect to the sole contention raised herein, that petitioner was allegedly deprived of his right to a jury trial, the court below stated (Petition, pp. A10-A11):

> "It seems clear to us from the court's instructions as a whole, including the supplemental instructions, that the court in effect instructed the jury that if they found that the plaintiff had not met the burden of proving any ascertainable actual damages, they should allow the plaintiff only nominal damages and that such verdict could be expressed by filling in the blanks provided for the amount of verdict with the words '$1.00' or 'speculative', and that the jury so understood the court's instructions, and that the jury by filling in the amount blanks with the word 'speculative' expressed their collective view that plaintiff was entitled to no substantial damages but only to nominal damages.

It appears from plaintiff's exception to the additional instructions on damages that he also understood the instructions. Such exception reads:

> 'The plaintiffs wish to object and except to the the additional oral instructions given by the Court to the jury, in that it invades the province of the jury, having the effect of directing the jury in the amount of damages to return on each count of the plaintiffs' petition, that amount being one dollar.'

We conclude that the jury's special verdicts reflect their decision that the plaintiff was entitled to only nominal damages. *Thus the court in entering judgment for $1.00, trebled, on each count was only entering judgment on the special verdicts of the jury. Plaintiff's claim that the court usurped the function of the jury and fixed the amount of damages independently of the verdicts is without merit. Plaintiff has not been denied a jury trial on the damage issue.*

Plaintiff contends that even if the court had authority to fix the amount of damages, there is no evidentiary basis for a finding that plaintiff failed to produce proof whereby the jury could have made a reasonable estimate of the amount of damages. *The answer is that the jury, not the court, made the finding that plaintiff had not established his right to recover substantial damages.* It is true that the court was of the view that the plaintiff had not offered evidence from which the amount of damages could be reasonably estimated, but *the court submitted the issue of damages to the jury and received their answer that such damages were speculative.* Since the jury determined upon the basis of all the evidence that plaintiff was not entitled to substantial damages, we see no need for passing upon defendants' motion for a directed verdict on the substantial damage issue. In any event, the evidence on damages, so well summarized in the trial court's opinion, affords a reasonable

basis for the jury as a fact-finder to reach a permissible conclusion that the plaintiff is entitled to no substantial damages." (Emphasis ours.)

ARGUMENT.

We cannot read petitioner's mind, but at best we understand his statement of the question involved it is that the trial court deprived petitioner of a trial by jury in that it "took the case from the jury by instructing them that they could either bring in one dollar damages or enter the word 'speculative'" and "the Court then sat as a jury and found as fact that petitioner was damaged in only the sum of one dollar." (Petition, p. 3). This is a gross distortion of what actually occurred and contains at least three glaring misstatements.

First, the trial court did not take the case from the jury. Rather, the jury rendered a unanimous verdict that the amount of petitioner's damages was "speculative." (R. 31-32).

Second, the trial court did not direct or instruct the jury either to bring in a verdict for one dollar or to enter the word "speculative" on the special verdict forms. The court merely advised the jury that in the court's opinion petitioner had not sustained his burden of proving any right to substantial damages without resort to speculation and conjecture. The court, however, also advised the jury not once but three times that it was not bound by the court's expression of opinion. (R. 354-56).

Third, the trial court did not sit as a jury and did not make any findings of fact on any issue. Upon receipt of the jury's verdict the court merely translated the jury's findings that the amount of petitioner's damages was spec-

ulative into a judgment for nominal damages (R. 71-75). This was a legal process, not a factual one.

Petitioner further errs in attributing either clairvoyance or misconduct to the trial judge in contending as he does that the judge when he gave the supplemental instructions of which petitioner complains, "knew that the jury had already made a positive finding of substantial damages." (Petition, p. 5).... Petitioner, in the same vein, also complains that the trial judge directed the jurors to write in the word "speculative" when they showed signs of disagreement on the amount of damages (Petition, p. 7). These unfounded, unwarranted and unsupported assertions can be given no credence whatever. Neither the court nor counsel were advised nor knew at any time prior to the rendition of the verdict as to the jurors' views on any issue. Petitioner's baseless inferences to the contrary have no foundation whatever.

Actually, petitioner's entire position is founded upon the untenable premise that the trial court took the case from the jury and directed the jury to return a verdict finding that petitioner's damages were speculative. From this petitioner concludes that he was denied a jury trial. However, with the premise failing, the conclusion must also fail. Contrary to petitioner's assertions, the facts are that (1) The court specifically informed the jury in its supplemental instruction that it was not bound by the court's expression of opinion (R. 354-5); and (2) The jury returned a unanimous verdict finding that petitioner had failed in his proof of damages (R. 29-32).

The truth of clause (1) immediately above is manifested throughout the charge, despite petitioner's studied attempts to conceal it. For example, immediately preceding the first sentence quoted by petitioner in his Statement (Petition, p. 5), the trial court stated (R. 355):

> "Now, I say this to you, and that is my opinion, but you use your own opinions and you are not to be influenced by anything that I say to you in this charge in that respect. You use your own opinions, consider the evidence."

In another place in this same charge the court told the jury that, "You are not bound by my opinion * * * I am expressing it to you but you are not bound by it." (R. 354). In the court's preceding general charge to the jury it also advised the jurors that they were not bound by any expression of the court's opinion on any factual issues (R. 296, 321). The jury was thus fully advised that it was not bound by the court's expression of opinion.*

The truth of clause (2) above is equally apparent. In addition to being instructed that they were not bound by the court's expression of opinion, the jurors were also instructed that their verdict must be unanimous and that they could write in the word "speculative" in respect to the special verdicts dealing with quantum of damages only if they were agreed that "that is the state in which [they were] left by reason of the proof in the case." (R. 355). The jury in reaching its verdict was in unanimous agreement that petitioner did not sustain his burden of proof upon the issue of damages. As the court below held, "the jury by filling in the amount blanks with the word 'speculative' expressed their collective view that [petitioner] was entitled to no substantial damages but only to nominal damages." (Petition, p. A10). The trial court did the only thing it could have done under the circum-

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*This Court has uniformly held that federal judges are not mere moderators, but are entitled to express opinions upon the evidence. *United States* v. *Philadelphia & Reading R. Co.*, 123 U.S. 113, 114 (1887). *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). And when they do so no court has ever held that they are thereby directing verdicts.

stances and translated the jury's finding that petitioner's damages were speculative into a judgment for nominal damages.*

The court below held that there was a reasonable evidentiary basis for the jury's finding that petitioner's damages were speculative (Petition, p. A11). Since petitioner does not challenge this ruling it must be accorded finality.** The conclusion is thus inescapable that there is no basis for review of the decision of the court below by this Court.

While petitioner makes a superficial attempt to contort this case into one of far-reaching impact and consequence, try as he may he cannot deny the one fact crucial to his position: he had the jury trial he demanded upon all issues

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*This Court has consistently held that speculative damages may not be recovered in private antitrust suits. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

**In *Lavender v. Kurn*, 327 U.S. 645 (1946), this Court said (pp. 652-3):

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.
>
> * * *
>
> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Accord *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 373-4 (1957); *Bailey, Admrx., v. Central Vermont Ry., Inc.*, 319 U.S. 350, 353-4 (1943); *Tennant, Admrx., v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944).

of fact, including those bearing on damages, and the jury returned a verdict against him. The trial court so recited stating (193 F. Supp. 438):

> "The jury rendered a verdict stating that in its opinion the evidence of damages was too speculative to be ascertained with a reasonable degree of certainty. Specifically, the jury found that plaintiff Craig Sportsteel suffered no damage with respect to alleged loss of circulation revenues and the loss suffered by plaintiffs with respect to advertising revenues was found to be speculative. Consequently, plaintiffs have compiled a record in this case which in both the Court's opinion and the jury's opinion, expressed by the verdict of the jury, made a recovery of damages by plaintiffs impossible to ascertain with a reasonable degree of certainty. Plaintiffs have accordingly failed to sustain their burden of proof and are entitled to no more than nominal damages."

The Court of Appeals agreed, stating (Petition, p. A10):

> We conclude that the jury's special verdicts reflect their decision that the plaintiff was entitled to only nominal damages. Thus the court in entering judgment for $1.00, trebled, on each count was only entering judgment on the special verdicts of the jury. Plaintiff's claim that the court usurped the function of the jury and fixed the amount of damages independently of the verdicts is without merit. Plaintiff has not been denied a jury trial on the damage issue.

We submit that no other conclusion is either appropriate or possible on this record. Analysis shows that petitioner was accorded a jury trial, that the jury reached a permissible verdict, that the court entered appropriate judgment thereon, and that nothing remains for review by this Court. Petitioner's reliance upon such stereotyped phrases as "subtle erosion of the Constitutional right to trial by jury" (Petition, p. 8), and "trend of conservatism

and reluctance by the Federal Courts * * * in sustaining awards of substantial amounts of damages" (Petition, p. 8) as grounds for invoking this Court's jurisdiction, do not give substance to petitioner's wholly superficial and unfounded contentions. This Court will not be misled by these baseless assertions.

CONCLUSION.

The decision below is correct, there is no conflict of decisions, and no other reason appears for review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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February, 1962.

APPENDIX TO RESPONDENTS' BRIEF.

Pertinent Statutes

Section 2 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C.A., Section 2, reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A., Section 15, reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."